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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 619

Case No. 672: DE ROZARIO-MILLER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Ioan Voicu; Mr. Mikuin Leliel Balanda;

Whereas at the request of Colette de Rozario-Miller, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 May 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 May 1992, the Applicant filed an application requesting the Tribunal, in essence:

"(a) to rescind the decision of the Secretary-General rejecting the unanimous recommendation of the Joint Appeals Board in favour of the Applicant;

(b) to find and rule that the Joint Appeals Board was correct in finding that the Applicant was denied her right to fair and objective consideration for promotion in both the 1986 and 1987 promotion exercises...

(c) to order that the Respondent remand the Applicant's case to the Appointment and Promotion Board for immediate rectification and that the Applicant's name be placed on the promotion register with retroactive effect from 1 October 1986;

(d) to order the Respondent, alternatively, to compensate the Applicant for lost earnings for the period 1 October 1986, through her date of separation from service at the applicable step and rate of the P-5 level;

(e) to order the Respondent to pay the Applicant the sum [of] $100,000.00 for the losses in her future pension entitlements occasioned by the Respondent's actions;

(f) to award the Applicant appropriate compensation for consequential and moral damages suffered...

(g) to fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at $200,000.00...

(h) to award the Applicant, as costs, the sum of $5,000.00."

Whereas the Respondent filed his answer on 5 August 1992;

Whereas the Applicant filed written observations on 14 September 1992;

Whereas, on 12 and 15 October 1993, the Applicant submitted an additional statement and further documents and on 20 October 1993, the Respondent submitted his comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 2 January 1967, as an Associate Editor, at the P-2 level, under a probationary contract. On 1 January 1969, she received a permanent appointment, as an Editorial Control Officer with the Department of Conference Services. On 1 April 1974, she was promoted to the P-3 level, as Programme Management Officer and transferred to the Department of Technical Cooperation for Development (DTCD). She was promoted to the P-4 level, as a Programme Management Officer on 1 April 1978.

The Applicant was assigned to the United Nations Centre for Human Settlements at Nairobi, Kenya, for a two year period, with

effect from 21 March 1979 through 1 June 1981, when she returned to Headquarters.

Between 1 July 1983 and 30 June 1985, the Applicant served as a Contracts Officer. Between 1 July 1985 and 1 March 1987, she served as Economic Affairs Officer. On 1 October 1988, the Applicant was reassigned, within DTCD, from the Water Resources Branch to the Country Programming and Evaluation Branch.

On 24 October 1991, she was reassigned, within DTCD, as Senior Programme Management Officer. She was promoted to the P-5 level, with effect from 1 May 1992 and separated from the service of the United Nations on 30 November 1992, having reached the mandatory retirement age.

The Applicant had become eligible for promotion to the P-5 level in 1983, having accumulated by that time, five years of seniority in her grade. Not having been recommended for promotion by her department, the Applicant instituted recourse proceedings, every year, from 1983 through 1987, requesting the Appointment and Promotion Board to include her name in the P-5 Senior Officer Promotion Register. She was unsuccessful.

The 1986 Promotion Review Exercise was postponed by the Secretary-General until 1987, on account of the financial crisis of the Organization. On 19 May 1986, the Director of the Natural Resources and Energy Division, transmitted to the Executive Officer for DTCD, the list of staff he was recommending for promotion in connection with the 1986 promotion review exercise "presented by grade in numerical ranking by merit". The Applicant was among the staff at the P-4 level, whom he recommended for promotion to the P-5 level. She was listed third. The Director indicated that he would support promotions to the P-5 level for all three listed candidates, including the Applicant, "should there be available posts at the P-5 level".

A departmental panel within DTCD met between June and August 1986, to review candidates for promotion within the Department. The panel consisted of seven members: two elected by the staff (one from the Professional category and one from the General Service

category), three appointed by the Administration, one representative of the then Office of Personnel Services and a Chairperson. Of the seven members of the panel, two were women. This panel reviewed candidates for promotion to a number of positions for the purpose of making recommendations to the Under Secretary-General, DTCD. On 8 August 1986, the Chairman of the Panel transmitted to the Under-Secretary-General, DTCD, its recommendations for promotion. The Applicant's name was not included in the panel's initial recommendations.

Subsequently, an additional P-5 position became available. The same panel (including the General Service staff member serving thereon) reconvened in February 1987, to make further recommendations in relation "to staff members who had fulfilled functions or had been selected for posts higher than their own", prior to the introduction of the Vacancy Management System. The Panel could not reach agreement as to whether the Applicant or another staff member should be recommended for promotion. There was a tie vote. In a communication dated 23 February 1986, informing the Under-Secretary-General, DTCD, of this result, the Chairman asked him to make his own selection, "taking into account views expressed by the members of the Panel" which were set forth in the communication.

On 11 March 1987, the Under-Secretary-General, DTCD, was provided with additional information concerning the four candidates recommended for promotion to the P-5 level by the Panel. The Applicant's name did not appear on the 1986 P-5 Senior Officer Promotion Register. Accordingly, on 26 January 1987, the Applicant instituted a recourse procedure before the Appointment and Promotion Board (APB) asking to be included in the 1986 Senior Officer Promotion Register. This memorandum was supplemented by additional memoranda to the Chairman of the APB on 30 March, 2 April and 16 July 1987. On 6 April 1988, the Chairman of the APB informed the Applicant that "notwithstanding the additional information presented in your communication, the Board's re-examination of your case did not reveal that there had been an omission so significant as to afford grounds for amending its decision".

On 14 June 1989, the Applicant instituted a recourse procedure, asking the Board to include her name in the 1987 Senior Officer Promotion Register, but was unsuccessful.

On 21 February 1991, the Applicant requested the Secretary General to review the administrative decision not to promote her to the P-5 level.

Having received no reply, on 10 May 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 3 December 1991. Its conclusions and recommendations read, in part, as follows:

> "Conclusions and recommendations
>
> 35. ...the Panel finds that the Appellant was denied the opportunity in the 1986 and 1987 promotion exercises to be considered fairly and without discrimination for promotion to the P.5 level.
>
> 36. The Panel therefore recommends that she be considered for promotion as soon as possible.
>
> 37. In addition, the Panel finds that the denial of her right to be considered for promotion objectively and fairly by the properly constituted bodies in accordance with established procedures, without outside interference and prejudice, and with due account being taken of the special guidelines relating to the equal treatment of women, amounts to discrimination.
>
> 38. The Panel considers that the Appellant is therefore entitled to compensation for the loss of the opportunity to fill a post at a higher level, commensurate with her acknowledged qualifications and abilities, and for the potential financial loss resulting therefrom.
>
> 39. In view of the fact that the Appellant is approaching the end of her career, even a promotion now would not materially compensate for that loss, especially in respect of her pension entitlements.
>
> 40. The Panel therefore recommends, unanimously, that an amount equal to one year's net salary, at her present grade and step, should be paid to her as compensation".

On 9 January 1992, the Secretary-General transmitted to the Applicant a copy of the Board's report and informed her as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report. It should be noted:
>
> (a) that promotion is within the Secretary-General's discretion; and
>
> (b) that, while there were some procedural irregularities in your case, there is no basis to conclude that, had such irregularities not taken place, you would have been promoted.
>
> In these circumstances, where, moreover, there is no other evidence of quantifiable damage, the Board's recommendation for payment of one year's net base salary is excessive and cannot be accepted. At the same time, the Secretary-General wishes to express his regret that irregularities occurred in your case and he has decided that you be paid compensation in the amount of one thousand dollars (US$1,000). He has also decided, in accordance with the Board's recommendation in paragraph 36 of the report, that you be given consideration for promotion as soon as possible."

On 31 May 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was deprived of fair and impartial consideration for promotion in 1986 and 1987 by the interjection of extraneous considerations and the utilization of irregular procedures in the promotion review.

2. The interjection of gender discrimination further compromised the fairness of the promotion process in her case, since "a pervasive pattern of discrimination, clearly reflected in the statistical evidence put forth by the Applicant to the JAB regarding the number of women at her level who have been promoted vis-a-vis their male counterparts is prevalent in the Secretariat".

Whereas the Respondent's principal contentions are:

1. The Applicant received fair and impartial consideration for promotion during the 1986-1987 promotion reviews. Procedural irregularities did not have any identifiable effect on the outcome of those promotion exercises, and were, therefore, adequately compensated by damages.

2. The Applicant's claim of gender discrimination is not supported by credible evidence. Mere assertions of statistical probability are insufficient to prove specific discrimination.

3. The Applicant's plea for damages is highly speculative in nature, not supported by evidence, and is inconsistent with the practice of this Tribunal. The Secretary-General's response to the JAB decision provides adequate compensation for any irregularities that occurred before or during the promotion reviews.

The Tribunal, having deliberated from 26 October to 9 November 1993, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General dated 9 January 1992, that although there were some irregularities in the 1986 promotion exercise which affected the Applicant, no basis existed for concluding that, had these irregularities not occurred, she would have been promoted. The Secretary-General, finding no other evidence of quantifiable damage, also decided that the JAB recommendation for payment of one year's net base salary was excessive and declined to accept it. However, the Secretary-General expressed regret that irregularities occurred and decided to award the Applicant compensation in the amount of $1,000. He accepted the JAB recommendation that the Applicant be considered for promotion as soon as possible. In fact, the Applicant was promoted to the P-5 level, a few months later. The Applicant asks for rescission of the Secretary-General's rejection of the JAB's recommendation for monetary compensation. She also asked for a ruling that she was denied fair and objective consideration for promotion in both the 1986 and 1987 promotion

exercises. The Applicant requests that the Tribunal should order the Secretary-General to remand the Applicant's case to the APB and place her name on the P-5 Senior Officer Promotion Register, with effect from 1 October 1986, or alternatively, order that she be compensated for lost earnings, calculated at the P-5 level, for the period from 1 October 1986 to the date of her separation. In addition, the Applicant requests compensation in the amount of $100,000 for losses in her future pension entitlements and compensation for moral and consequential damages. The Applicant also asks the Tribunal to fix, pursuant to article 9.1 of its Statute, $200,000 as compensation in lieu of specific performance. Finally, the Applicant asks for an award of costs in the sum of $5,000. In addition, the Applicant requests that oral hearings be held.

II. The Tribunal considers that the information before it is adequate for resolution of this case and therefore denies the request for oral hearings.

III. With respect to the 1986 promotion exercise, the Applicant's position is that it was tainted, as far as her candidacy for promotion to the P-5 level was concerned, by (1) discrimination against her on account of her gender, (2) the participation of her supervisor, at the instance of her Department, on a Departmental Internal Review Panel and, later, as an alternate member selected by the staff to the APB, (3) the participation of a General Service staff representative on the Internal Review Panel considering her candidacy for the P-5 level, and (4) a communication from the acting chairman of the Internal Review Panel to the Under-Secretary-General in charge of her Department, relating to an evenly divided vote between her candidacy and that of another staff member in the Internal Review Panel. The Tribunal will consider each of these issues.

IV. With respect to the claim that there was a pattern of gender discrimination against the Applicant and against women in general in the Applicant's Department, the Tribunal is unable to conclude that the Applicant has met her burden of proving such an allegation by substantial evidence. The only basis for the Applicant's contention is an alleged statistical disparity between the percentages of males and females promoted by the Department. Without more, such a generalized showing is insufficient to establish that the Applicant or anyone else was discriminated against on account of gender. The JAB, likewise, concluded that this was insufficient to enable it to come to a conclusion that gender-based discrimination had been proven.

V. To the contrary, the evidence shows that the Director of the Applicant's Division had no hesitation in expressing his willingness to support the Applicant's candidacy and there is no evidence whatever that the Department's Internal Review Panel considering her candidacy was in any way negatively influenced by considerations of her gender.

VI. With respect to the Applicant's claims regarding the role of her supervisor on both the departmental Internal Review Panel and as an alternate member of the APB, the Tribunal concludes that this constituted a procedural irregularity. In the Tribunal's view, there would have been no objection to the Applicant's supervisor functioning as a member of either the Internal Review Panel or the APB, but he could not be both. Although there is no evidence that the Applicant's supervisor was improperly biased against her, once he became involved, through his membership in the Internal Review Panel, in the Department's recommendation to the APB to promote a particular candidate, he, in a sense, thereby became an advocate for the departmental position. He should not, thereafter, have participated in the APB's consideration of the Applicant's candidacy because of either the reality or the appearance of being unable to function with the independence, objectivity and open-mindedness

called for at the APB level. In short, this duality compromised the fair treatment to which staff members are entitled in the consideration of their candidacy by the APB. He should have recused himself from participation in the APB's consideration of the post for which the Applicant was a candidate. His failure to do so constituted an irregularity. However, the Tribunal does not consider that this case, in which there was no pending claim or finding of discrimination, is necessarily governed by the Tribunal's Judgement No. 507, Fayache (1991), paragraph XIV. All the more so, because the individual involved was not an Assistant Secretary-General, acting at the same time as chairman of the APB,

VII. With respect to the Applicant's claim regarding the impropriety of the participation in the Internal Review Panel of a General Service staff member, the Tribunal recognizes that staff rule 104.14 does not apply. A departmental internal review panel merely serves as a means for the department's staff to provide input prior to any departmental recommendations to the APB. Nevertheless, the Tribunal shares the view of the JAB, that the General Service staff member's participation was an irregularity adversely affecting the Applicant's candidacy, particularly, because it resulted in a tie vote. If it is thought that staff members being considered for promotion should be reviewed only by persons who are at or above the level to which promotion is contemplated, it seems illogical to the Tribunal that - despite the fact that the process does not fall, technically, within staff rule 104.14, - an individual who does not meet that criterion should be placed in a position of being able to cast a vote in the promotion review of a candidate at a higher level or take part in the decisions thereof.

VIII. With respect to the claim of irregularity concerning a communication to the Under-Secretary-General, by the acting chairman of the Internal Review Panel, which was forwarded after the Panel had been evenly divided, the Tribunal does not consider that this constituted an irregularity. The chairman, or an acting chairman,

would have been free at the time of the Panel's tie vote to have submitted, along with it, to the Under-Secretary-General, the sort of supplementary factual data contained in the communication involved, as well as his reasoned personal assessment of that data. Nothing in the communication violated the terms of reference of the Internal Review Panel and the fact that it was submitted after the evenly divided vote is of no consequence. That, as the JAB speculated, this communication may have helped tip the balance against the Applicant, insofar as the ultimate departmental recommendation was concerned, is not, in the view of the Tribunal, an irregularity.

IX. With respect to the 1987 promotion review, it does not appear that the JAB addressed itself to any issue other than the broad claim of gender-based discrimination with which the Tribunal has dealt above. The JAB report states, with regard to the Applicant's 1987 review that, "according to a memorandum by the Deputy Executive Officer of DTCD, ..., there was 'no vacant post when the [1987] review took place except for those posts which were already under circulation through the Vacancy Management System. No one, not just the [Applicant], was therefore reviewed in any serious manner by the internal review panel'." Moreover, the application notes that the Applicant's supervisor died during the course of the 1987 promotion exercise. It is unclear from this and from the preceding quotation from the JAB report, whether any of the Applicant's contentions, other than that of gender-based discrimination, which has been rejected by the Tribunal, apply to the 1987 exercise. In any event, the Tribunal finds that, because of the irregularities noted above, the Applicant was deprived of the fair consideration to which she was entitled during the 1986 promotion exercise. The Tribunal recognizes, of course, that even if there had been no irregularities, there is no assurance that the Applicant would have been promoted. In fact, the successful 1986 candidate for the P-5

post for which the Applicant was being considered, was a staff member other than the person recommended by the Applicant's Department.

X. In the circumstances of this case, the Tribunal finds that the $1,000 award to the Applicant by the Secretary-General's decision is insufficient compensation for the unfair treatment she received. Accordingly, the Tribunal orders that an additional $5,000 be paid to the Applicant as compensation for the unfair treatment described above.

XI. The Applicant has submitted to the Tribunal additional observations raising certain issues that were not considered by the Joint Appeals Board. Accordingly, they are not properly before the Tribunal under article 7 of its Statute.

XII. In view of the foregoing, the Tribunal orders that:

1. The Respondent pay $5,000 to the Applicant;
2. Decides that all other claims are rejected; and
3. Declines to make any award of costs in keeping with the policy announced by it in Judgement No. 237, Powell (1979).

(Signatures)

Jerome ACKERMAN
President

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

New York, 9 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary